NO. 649

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

BEN F. RAY, as Chairman of the State Democratic Executive Committee of Alabama, *Petitioner*,

v.

EDMUND BLAIR, *Respondent*.

BRIEF AND ARGUMENT FOR RESPONDENT

HORACE C. WILKINSON,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MAY IT PLEASE THE COURT:

This case involves the legality of an attempt, by a state agency, to coerce a would-be candidate, in the Alabama primary, for nomination for presidential and vice presidential elector, into agreeing to abandon, if nominated and elected, his individual judgment in the performance of a duty enjoined on him by the Twelfth Amendment to the Constitution of the United States.

The Supreme Court of Alabama ruled that the attempt was void being in violation of the Twelfth Amendment.

Respondent was denied the right to become a candidate by the Chairman of the State Democratic Executive Committee because he would not agree to aid and support the nominees of the National Democratic Convention for President and Vice President if Mr. Truman or anyone advocat-

ing his civil rights program is the nominee of that convention.

Where the state law has made the primary an integral part of the procedure of choice, and that is true in Alabama, or where in fact the primary effectively controls the choice, which is the case in Alabama,—a one-party state—the rights of the voter, secured by the Constitution, are the same in the primary and the general election. He has a right to have his ballot counted in the primary and in the general election. He has the same basic fundamental right to run in the primary, as in the general election. He cannot be denied a place on the ballot in the primary for a reason that would not exclude him from the ballot in the general election.

U. S. v. *Classic*, 313 U. S. 299, 318.

Alabama requires electors to be elected by popular vote.

Ala. Code 1940, Title 17, Section 222.

Article 2, Section 1, of the Constitution of the United States provides:

> "Each State shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors," etc.

The Twelfth Amendment provides:

> "The Electors shall meet in their respective states and vote by ballot for President and Vice President," etc.

In Section 2 of the Fourteenth Amendment it is provided:

> "But when the right *to vote* at any election *for* the choice of *electors* for President and Vice President of the United States, * * * *is denied* to any of the male inhabitants of such State * * * *or in any way abridged*, * * * the basis of representation therein shall be reduced" * * * etc. (Italics ours)

A vote by ballot means an uncoerced ballot. The right to vote for Presidential and Vice Presidential electors (where the State requires them to be elected) is secured by the Twelfth and Fourteenth Amendments. If respondent cannot be excluded from the ballot in the general election solely because he will not agree to cast an electoral vote for Mr. Truman, if respondent is elected and Mr. Truman is nominated such reason furnishes no basis for excluding him from the primary where the primary effectively controls the choice.

The Constitution unequivocally vests the power and authority in, and makes it the duty of, the electoral college to vote for a president and vice president. There is no expressed limitation on the authority of the electors in choosing a president, other than the constitutional qualifications prescribed for a president, and there is no language in the instrument from which any limitation might be implied. The method provided by the Constitution for electing a president is exclusive. No other method is provided save and except the provision for an election by the House of Representatives in the event no person receives a majority of the votes in the Electoral College.

Whether an elector be a state officer or not is immaterial as we see it. In voting for a president in the electoral college, the elector is discharging a duty enjoined on him by the Constitution of the United States. Alabama has authorized the nomination of candidates for elector in a primary which is an integral part of the election.

Smith v. *Allwright*, 321 U. S. 659.

While the mode of appointment belongs to the state, the federal constitution defines the duty of the electors after their appointment in the following language:

> "The Electors shall meet, in their respective states, and vote by ballot for President and Vice President."

The duty to meet is enjoined. The place of meeting is designated. The method of choosing is prescribed. The officers to be chosen are named.

If the duty to meet and to choose by ballot, does not mean an uncoerced ballot; if it does not mean a ballot that represents the judgment and discretion of the elector casting it, then what kind of ballot does it mean? Do we know of any kind of a ballot in our procedure of choice other than an uncoerced ballot, a ballot that represents the deliberate judgment of the elector casting it?

The intention of the founding fathers that the electors should be free to exercise their judgment and discretion in choosing a President and Vice President is apparent from the language used, the system devised, the object to be accomplished, and contemporaneous history. Eleven proposals for the selection of the executive were considered by the Constitutional Convention of 1787 before the method in the Constitution was approved. The founding fathers earnestly sought a method of selecting the executive which would make him independent not only of the other branches of the federal government but of state and foreign governments also.

McPherson v. *Blocker*, 146 U. S. 1.

See "A Republic—if you can keep it" by Hon. Logan Martin, American Bar Association Journal, January, 1942, printed in the appendix.

They also entertained a fear of popular government in its broadest sense. That governments of and by the people might become arbitrary seems to have been taken for granted. To meet the situation the electoral college was invested with the right, power and authority to differ from caucuses, conventions, and all manner of groups respecting the individual who should be chosen President. The electoral college has never lost that right, power and authority. It is of the highest importance that its independence be

maintained. *Once the right to coerce the judgment of electors is recognized, the means and methods of coercion are only limited by the ingenuity of man.*

The independence of electors is some assurance that the National Convention will be inclined to nominate men of honor, virtue and integrity, who will not be turned down by the electoral college. The independence of the electors is a safeguard against undue influence by pressure groups on the convention. As long as the electors remain free, conventions are on notice that corruption in the nominating process or incompetence in the candidate may have to run the gauntlet of honest electors.

The fact that the deliberate judgment of the electors and the judgment of the conventions have coincided for the last one hundred years or more does not indicate that electors may not differ from a convention respecting the individual to be chosen for President. It only indicates that the necessity for differing may not have arisen during that time. Married people sometimes live the better part of a life time in harmony only to fall out with each other in their old age.

The fact that electors may have been chosen simply to register the will of the appointing person in respect to a particular candidate does not militate against respondent. He is seeking to ascertain the will of the Democrats of Alabama, and to use his best judgment in executing it. If the Democrats of Alabama do not want Mr. Truman for their President, Respondent will appeal to them. He is certainly entitled to use his judgment about an acceptable person when the time comes to vote in the electoral college.

When the constitution is considered as a whole, we think it apparent that the Twelfth Amendment contemplated that the electors should have the same freedom of action in the performance of their duties, as legislators enjoyed, at the time the Twelfth Amendment was adopted, in voting for United States Senators.

With respect to Senators the Constitution provided:

> "The senate of the United States shall be composed of two senators from each state, *chosen by the legislature thereof*" * * * . (Italics supplied)

With respect to a President and Vice President, the Twelfth Amendment provided:

> "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors * * *." Article II, Section 1.
>
> "The electors shall meet in their respective states, and vote by ballot for president and vice president."

Was it ever contemplated that a Senator might be coerced into abdicating his right to use his individual judgment on important public questions before he could be eligible to be considered by the Legislature or qualify as a candidate in the primary? May the Democratic party in Alabama require a candidate to swear he will aid and support every plank in the platform adopted at the convention as the price of being allowed to become a candidate in the primary? Hasn't a Senator the right and isn't it his duty to oppose measures disapproved by his constituents? If a Senator may do so, may not an elector refuse to vote for an individual who is not acceptable to an overwhelming majority of the members of the party that nominated him?

In 1910 Wisconsin enacted a primary law which provided for the nomination of party candidates for the office of United States Senator at the primary election although the Constitution of the United States at that time provided for the election of United States Senators by the legislature.

The primary law was attacked on the ground that it operated to coerce the judgment and discretion of the legislature in choosing United States Senators, * * * and operated to secure their election by popular vote.

To rescue the statute from a sentence of judicial nullification on the ground that it was unconstitutional because it

was claimed members of the legislature were obligated to vote for the nominee of their party, the Supreme Court of Wisconsin declared that the law operated as a quasi-petition to the legislature and imposed no legal obligation on any member of the legislature to vote for his party nominee at the primary. In that way, the court kept the statute from being declared unconstitutional on the ground that it coerced the judgment and discretion of the legislature in choosing a United States Senator.

State vs. *Fear,* 142 Wisconsin 320.

We can think of no reason why electors should have less freedom of action in the performance of their duty to elect a President than legislators had in the performance of their duty to elect a United States Senator.

The legislatures never lost their right to freely exercise their judgment and discretion in electing a United States Senator until that right was taken from them by an amendment to the constitution.

The construction of the Twelfth Amendment we contend for would ascribe to it a meaning in harmony with the purpose of the primary law, which is voter control of political parties. It would be a recognition of the inherent and indefeasible right of the voters to nominate whom they will as the party's candidate to represent the people in the electoral college. The Democratic party in Alabama is an autonomous nominating body. The idea that it can be confined to those who agree to vote a certain way in nominating electors is preposterous.

The construction we contend for does not prevent the Democratic party in Alabama from being represented in the general election by candidates for electors who are willing to pledge blind allegiance to the nominee, yet to be named, of a convention yet to be held, on a platform yet to be written,—if the voters will approve them in the primary. *It only prevents the committee from excluding opposition to candidates who are willing to make a blind date with destiny.*

The construction advocated by the petitioner would operate to secure the election of a President and Vice President by popular vote—a method not recognized by the constitution. If election by popular vote was contemplated, why the provision for election by the House in event no candidate receives a majority of the votes cast in the electoral college?

If we are to have the election of a President by popular vote we must amend the constitution as was done when we changed the method of electing United States Senators.

Now let's examine the "messenger boy" status petitioner would have the court saddle on electors. If the object and purpose of the primary laws is to shift the burden of and responsibility for the election of a President from the electors, to the members of a political party, if the electors are to play the parts of automatoms and become mere passive instruments by and through whom the will of the voters is to be carried out; if to them is left the perfunctory duty of ratifying the action of the voters at the primary, then how tremendously important it is that the voters at the primary be not restricted in their choice of candidates for nomination for electors to a group approved by the committee. If the voters are entitled to a representative in the electoral college, they are entitled to a representative who is at least free to vote in accordance with their wishes, if the representative desires to do so.

Suppose that two or three days before the November election the nominees of the National Democratic Convention die or resign, or become insane or it is discovered that a Benedict Arnold was nominated and he has fled the country and sought asylum in a foreign land. For whom would the messenger boy-electors cast their electoral votes? If they are chosen simply to register the will of the National Democratic Convention in respect to a particular candidate for President and that is the limit and extent of their authority, if the Democrats had an overwhelmning majority in the electoral college they could not in such circumstances

elect a President. The President would have to be elected by the House of Representatives, which might be overwhelmingly Republican. The founding fathers never contemplated any such ridiculous situation, which might readily result if a rubber stamp status is imposed on the electors. Neither custom, usage nor practice should be allowed to make the American people ridiculous. We should not be presented to the world as too inept to foresee and provide for possible situations of that kind.

We submit that these reasons lead irresistably to the conclusion that the electors have not lost their power to differ from conventions respecting a choice for President and Vice President, and that this power cannot be taken from them by a state, or a state agency.

II

But it is said that the Democratic party in Alabama, an agency of the state—*Davis* v. *Schnell,* 81 Fed. Supp. 872, affirmed 336, U. S. 933—may do what the State itself is powerless to do. What cannot be done directly may not be done indirectly.

Bliley v. *Wert,* 42 Fed. 2nd 101.
Baskin v. *Brown,* 174 Fed. 2nd 391.

The position of petitioner is that the executive committee may refuse to allow 300,000 democrats in Alabama to express themselves regarding electors, unless they express themselves one way. How absurd it is to say that the elector's judgment cannot be coerced after he is elected, but that it may be sufficiently coerced before he is elected to make coercion after election unnecessary. Petitioner, we submit, cannot be allowed to make a pledge of party loyalty serve the *purpose* of amending the Constitution and operate to secure the election of a President by popular vote.

Respondent's position is one of unqualified loyalty to the Democratic party in Alabama. He says if he is a candidate

in the May 6th primary he will support the nominees of that primary even though that means voting in the general election for Presidential and Vice Presidential electors who are pledged to vote in the electoral college for Mr. Truman or some one advocating his policies; but if respondent is nominated and elected he will not cast an electoral vote for Mr. Truman or any one advocating his civil rights program.

If the state cannot impose on a candidate the obligation to vote in a certain way, in order to get on the ballot in the general election, it is difficult to imagine how a state agency can impose the obligation as a condition to a place on the primary ballot in a state paid and state conducted primary, which in fact effectively controls the choice.

U. S. v. *Classic, supra.*

III

There is, as we see it, one glaring error in petitioner's argument that explains the conclusion reached that the Constitution has been amended by 100 years of practice, and that error is in claiming that "The Alabama holding effectively deprives the voters in that state of the opportunity of effective choice of a President of the United States. Petitioner's brief, p. 15.

The Alabama holding does not deprive the voters in that state of anything. There are candidates for nomination for election who are willing to accept the status of a messenger boy, and who have declared under oath that they will, if elected, cast their electoral vote for Mr. Truman or any one else nominated by the National Democratic Convention.

Manifestly a holding which offers the voter full opportunity to choose between two diametrically opposed views takes nothing from any one.

We have never contended that a candidate for nomination for elector may not make his views known, if he

desires to do so. Few, if any, can be nominated unless they announce their position. But for an individual to be forced to do so, and forced to announce that he will vote—not as the people want and not as his deliberate judgment dictates, but as the committee dictates, in order to get on the primary ballot, smacks too much of dictation to be associated with a republican form of government.

The Democrats of Alabama do not have to vote for respondent and his group unless they desire to do so. If they desire to do so they should not be denied their right to do so.

The Democrats of Alabama may well say that *they know now who they do not want for President*, but that they prefer to wait until after the Convention before deciding on the individual their judgment says should be the next President. They may say that the world picture is unclear; that no man knows what a day may bring forth; that war or peace with Russia in November would have a vital bearing on the man who should be voted for at that time; that whether we return to the gold standard, or further devalue the dollar in January 1953, may be of paramount importance to the country.

We know of no law that requires the Democrats of Alabama to irrevocably make up their minds on May 6th 1952 who their electoral vote should be cast for in November, 1952. We know of no law that prohibits them from reserving judgment on such matters, and saying, that they prefer to risk the judgment of eleven of their fellow Democrats, come November, about the best man for President, than to decide the matter now.

The respondent, and his fellow Democrats in Alabama have a right to have on the primary ballot, men and women who represent these views, and respondent has a legal right to a place on the ballot so those who advocate that course of action may cast a ballot that represents their views. Only by allowing the elector to use their judgment and discretion in November can the result suggested be worked out.

The petitioner would advance the general election in November to May 6th 1952 in Alabama.

Suppose that in November 1952, world conditions are such that the people of the nation are of the opinion that both major political partys made a mistake in their July nominations and that our safety and security calls for a man for President who shuns politics as he shuns the plague? Must we have a revolution to save the country? An electoral college authorized to use its judgment is a form of a safety valve that should not be junked in days of high pressure and tension.

The Twenty-one States

(Petitioner's brief, p. 19.)

Much is made by Petitioner of the alleged direct vote for President and Vice President in 21 states (pp. 11, 19, 20 and Appendix B).

(1) In the first place the proceedings in these States have no relation to the question here involved in the State of Alabama. They relate to the general election in November. We are here dealing with a primary.

(2) Furthermore, we are here questioning the power of a committee of a political party to control the vote of a Presidential Elector in the Electoral College. That question is not involved in these 21 States.

(3) Petitioner states that in these 21 States the people vote directly for President and Vice President. His own presentation (Appendix B) of this question is a denial of his position. In such case it is a vote for the Electors for President and Vice President.

(4) At the time of this vote (November) the Electors in these States have already been nominated and are on file with the Secretary of State (of the State).

(5) The Constitution does not require the Electors' names to be printed on the ballot. The State legislatures

are free to choose any method of appointing the Electors. Some of these States took the names of the Electors off of the ballot because they complicated the use of the voting machines. The legislature of the State of Georgia has empowered the Governor to appoint the Electors in which case there will be no nomination and no election of them by the voters. In none of these cases does the question of the control of votes in the Electoral College arise. In the case of the twenty-one States they simply chose the general election as the procedure for the naming of the Electors to the Electoral College. Their statutes here cited by Petitioner clearly show that their legislatures had no intention of attempting to permit a direct vote for President and Vice President.

(6) The procedure in these 21 States does not involve any question of the function of the Electors in the Electoral College after the November election. They are nominated by political parties prior to November and these nominations are submitted under party labels to the voters in the general election. The highest slate wins and those nominees who won will go to the College in December. There they will, according to party loyalty vote for their party's candidates. That is the method chosen by these 21 States and there is nothing revolutionary about it.

IV

State ex rel. Republican Committee v. *Wait*, 92 Neb. 212, 138 N. W. 159, 43 L. R. A. (N. S.) 292, is based on the theory that the Roosevelt electors vacated their offices by accepting the nomination of the Progressive party for election. We have no quarrel with that case. It has no relevancy here. Respondent has no idea of becoming the nominee of a rival political party for election.

V

We challenge the statement, Plaintiff's brief, p. 22, that Democratic electors, by statements that they will cast votes

for the National Party nominee, will be acting in a manner totally inconsistent with their nomination. If they are nominated for that very reason, how can it be claimed that they will be acting in a manner totally inconsistent with their nomination? This argument means that Alabama Democrats are tied to the chariot wheels of any individual who can control the National Democratic Convention. Are the chains that bind us so strong that our voluntary affiliation can not be terminated? Do we not have the right to "disaffiliate"?

Responsible Party Government

(Petitioner's brief, p. 24.)

Petitioner argues that the "concept of American democracy * * * is responsible party government" which is said to be similar to that of the British parliamentary system. This is a misconception of the situation. The British have an written constitution and for this reason Parliament possesses the sovereign power and can change at will the form of the government as they have done. There is a party in power and an opposition but this has not in recent years led to stability.

The United States is not a democracy but a Constitutional Republic in a Union of sovereign States each with a Republican form of government.

We are governed by a written instrument of organic law which delimits the respective powers of the States and the Federal Government. This Constitution can be amended when strong public opinion demands it, but this is a process of great and careful deliberation.

The Constitution has never recognized our political parties as having any responsibility for the operations of the Federal Government. Our parties are organized under the laws of the various States. Organizationally they are State parties. There are no national political parties in this sense. We have two principal party names but each has

become so divided in opinion on the principal issues of the day that public opinion cannot find a consistent expression in either.

So faras Alabama and several other Southern States are concerned there is in reality no two-party system at all. There is only one effective party and it is the Democratic Party of the State. In Alabama the Democratic primary is the election. The nominees of that primary are assured of election in November.

VI

It is said that "The Democratic Committee, by adopting a party loyalty pledge, has not dictated respondent's electoral vote. Brief, p. 25. That is true if the Court looks at form only. It is not true if the Court regards substance as paramount to form.

VII

It is also said "We submit he may not successfully claim a constitutional privilege to run as a Democrat and vote as a Republican." Brief p. 25. In the first place the record supports no such statement. In the next place this argument means that the Democrats of Alabama must vote for an office seeker, instead of seeking a man big enough for the job. That's a novel conception of the rights of [illegible] Democrats.

The United States of America never produced greater statesmen before or since the era in our history when the people sought the man.

VIII

In Section B of Petitioner's brief, p. 26, it is said that "The Committee action under attack in this case is a pledge to aid and support the nominees of the Democratic National Convention, required as a condition for participation as a candidate for Democratic Primary nomination in Alabama. Electo candidates are included."

The pledge is meaningless as applied to all candidates, except Elector-candidates.

An individual may aid and support a candidate in one or more of three ways: (1) By voting for him. No *candidate* can vote for any individual for President. (2) By contributing his time, or (3) his money or other forms of property.

We sincerely submit that the committee does not possess the power of taxation. It would be unfortunate if it had the power to say, not only, that we must contribute time and money, but how much time and money we must contribute "to aid and support", in addition to the assessments we pay for becoming a candidate.

IX

It is mistakenly assumed on page 27 of Petitioner's brief that the Committee could have appointed eleven electoral candidates to run in the November election, and that Title 17, Section 336, Alabama Code 1940 gives the committee such power.

If the committee calls a primary nominations for elector must be made. The committee may determine the party officers to be voted for. It cannot determine the public officers to be voted for. See Title 17, Section 336 in the Appendix.

X

We answer petitioner's claim on page 29 of his brief that a presidential elector is accorded no general right of franchise under any interpretation of the Federal Constitution by saying that the Constitution imposes the duty on him to vote by ballot for a President and the Constitution requires the basis of representation in any state to be reduced, if "the right to vote at any election"—primary or otherwise—for the choice of electors for President and Vice President is "in any way abridged." How can he vote by ballot unless he is elected? How can he be elected unless he is nominated by the dominant party in a one-party state? How can he be nominated unless he is allowed

to become a candidate and to have a place on the primary ballot?

Respondent is excluded from the primary not because he is not a qualified voter; not because he does not meet all of the requirements laid down by the committee—save one—which is that he perform his official duties in the way the committee insists should be done, instead of in the way the Petitioner believes the Constituiton requires them to be performed. To deny him and all others a place on the primary ballot on that account is to abridge the right of 380,000 Democrats in Alabama to vote for their choice of electors.

If Petitioner can be excluded from the primary solely because of his loyalty to the Constitution of the United States that document is much weaker now than it was in the beginning.

If the right to vote at a primary for the nomination of a candidate for Congress, *U. S.* v. *Classic*, *supra*, is a right secured by the Federal Constitution, it would seem that the right to vote for the nomination of a member of the Electoral College is a right protected and secured by the Federal Constitution. If the right to vote is secured, it carries with it the right to become a candidate for such nomination if the voter possesses the qualifications required by law for holding the office. Of what value is the right to vote if the voter cannot have on the ballot a candidate who appeals to him, even if the candidate be none other than the voter himself.

XI

Petitioner claims that "Neither respondent nor the Court below has discovered how respondent has been injured in his constitutional rights. Petitioner should read the 14th Amendment. The shoe is on the other foot. How has the Chairman of a Committee been injured by the decision rendered by the Supreme Court of Alabama. Does a political party, as such, have any constitutional rights? Does the Chairman of the Executive Committee of a political party,

as such, have any constitutional rights? Whose constitutional rights were denied by the Supreme Court of Alabama? The only party litigant before that court with constitutional rights was the respondent. That court's decision that respondent has certain constitutional rights, is not a denial of a single constitutional right of any other person. Even if the Supreme Court of Alabama is in error in saying that candidates for election cannot be moved, such holding violates no constitutional right of any one else, and there is nothing here for the Court to review. What provision in the Constitution gives Petitioner, or the party a constitutional right to elector anyone?

Correction.

Petitioner's copy of Act 396, now Sec. 226, Title 17, Ala. Code of 1958, on page 32 of Appendix "A" overlooks the amendment to that statute approved Aug 29, 1958,—Act #557, 1958 Session Alabama Legislature, omitting any reference to how electors shall cast their ballot.

Conclusion

No court confusion has been laid upon the duty of the party and the rights of the respondent, that we fear that the rights of 200,000 Democrats in Alabama have been more or less ignored.

Exactly on this point where was attempted to obtain court approval of a handful of men telling 200,000 Democrats in Alabama to vote for Truman electors or get out of the party. If the Constitution of the United States protects that kind of action we have misread the document.

Respectfully submitted,

HORACE C. WILKINSON,
Attorney for Respondent

Certificate

I have delivered a copy of the foregoing brief and argument to Marx Lera, Esq., opposing counsel of Washington, D. C., on this the 29 day of March, 1952.

Horace C. Wheeler.

APPENDIX "A"

Alabama Code, 1940, Title 17, § 222.

§ 222. (536) (446) (1653) (435) (342) (388) (339) **Presidential electors and representatives in congress to be elected.**—On the day prescribed by this Code there are to be elected, by general ticket, a number of electors for president and vice-president of the United States equal to the number of senators and representatives in congress to which this state is entitled at the time of such election; and there shall be elected one representative in congress for each congressional district.

APPENDIX "B"

Alabama Code, 1940, Title 17, § 336

§ 336. Election by party as to whether it will come within primary law.—A primary election, within the meaning of this chapter, is an election held by the qualified voters, who are members of any political party, for the purpose of nominating a candidate or candidates for public or party office. Primary elections are not compulsory. A political party may, by its state executive committee, elect whether it will come under the primary election law. All political parties are presumed to have accepted and come under the provisions of the primary election law, but any political party may signify its election not to accept and come under the primary election law by filing with the secretary of state, at least sixty days before the date herein fixed for the holding of any general primary election, a statement of the action of its state executive committee, certified by its chairman and secretary, which statement shall contain a copy of the resolution or motion adopted declining to accept and come under the primary election law. If a political party declines to accept and come under the primary election law it shall not change its action and accept and come under the primary election law until after the next general election held thereafter. The state executive committee of a political party may determine from time to time what party officers shall be elected in the primary; provided, candidates for all party offices shall be elected under the provisions of this chapter unless the method of their election is otherwise directed by the state executive committee of the party holding the election. (1931, p. 73.)

APPENDIX "C"

"A Republic—If You Can Keep It"

By Wm. Logan Martin
of the Birmingham (Alabama) Bar

So intent was the Constitutional Convention of 1787 in securing a method of selecting the executive which would make him independent not only of the other branches of the federal government but of state and foreign governments also, that the Convention in determining on a plan considered the following eleven proposals for his selection:

1. By the National Legislature (Congress);
2. By the People;
3. By the Electors (a) Chosen by the State Legislature,
   (b) Chosen by the People;

And if the Electors should fail to Elect, That Selection Be Made

4. (a) By the Senate, or
5. (b) by the House and Senate, or
6. (c) By the House;
7. By the Second Branch of the Legislature (Senate);
8. By the State Executives;
9. By State Executives with Advice of State Councils;
10. By State Legislatures;
11. By the States, Each of Which Would Vote for a Different Executive and from the Number Thus Selected either the National Legislature or Electors Appointed by the National Legislature Would Select the Executive.

1. By the National Legislature

This was first proposed as the Virginia Plan.[1] It was said that as the executive was only an institution for carrying the will of the legislature into effect, the latter ought to appoint an executive who would be accountable to that body only.[2] He should be absolutely dependent on the legislature, an independence of the executive from the legislature being the very essence of tyranny.[3] The sense of the nation would be better expressed by the legislature.[4] If

[1] Formation of the Union, Government Printing Office, Sixty Ninth Congress, First Session, House Document No. 398, p. 117, May 29, 1787.

[2] Ib. p. 132, Mr. Sherman—June 1. 22 of the 39 signers spoke on this general subject.

[3] Ib. p. 134, Mr. Sherman—Ib.

[4] Ib. p. 392, Mr. Sherman—July 17.

the salary of the executive should be fixed, and he be made ineligible for a second term, there would not be such a dependence on the legislature as opponents of the plan imagined.[5]

The objections made to this plan were many. There would be a constant intrigue for the election; the legislature and the candidates would bargain and play into one another's hands; votes would be given under promises and expectations of recompensing the members of the legislature by services to them or to their friends.[6] The executive would be the mere creature of the legislature so appointd and must needs be impeachable by that body. It would be a work of intrigue, of cabal and of faction, like the election of a pope by a conclave of cardinals; real merit would rarely be the title of appointment.[7]

Since it was admitted to be a fundamental principle of free government that the legislative, executive and judicial powers should be *separately* exercised, it was equally fundamental that they be *independently* exercised. There is the same and perhaps a greater reason if the executive should be independent of the legislature that the judiciary should be so. A coalition of the executive and legislative would be more immediately and certainly dangerous to public liberty. Therefore the appointment of the executive should either be drawn from some source or held by some tenure that would make him a free agent with regard to the legislature, and this could not be if he were appointable from time to time by the legislature. It was not clear that such an appointment in the first instance, even with ineligibility afterwards, would not establish an improper connection between the two departments.[8] In addition to the general influence of that mode on the independence of the executive, the election would agitate and divide the legislature so much that the public interest would materially suffer thereby. The candidate would intrigue with the legislature, would derive his appointment from the predominant faction, and be apt to render his administration subservient to its views.[9]

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5 Ib. p. 395, Mr. Williamson—Ib.

6 Ib. pp. 136-7, Mr. Gerry—June 2.

7 Ib. p. 292, Mr. Govr. Morris—July 17.

8 Ib. pp. 412-13, Mr. Madison—July 19.

9 Ib. pp. 449-50, Mr. Madison—July 25.

Foreign ministers would exercise their influence on the legislature in order to gain an appointment favorable to their wishes. Germany and Poland were witnesses of this danger. In the former the election of the head of the empire, until it became in a manner hereditary, interested all Europe and was much influenced by foreign interference. In Poland, although the elective magistrate had very little real power, his election had at all times produced the most eager interference of foreign princes, and had in fact at length slid entirely into foreign hands.[10] It would be difficult to avoid cabal at home and influence abroad.[11] The legislature would exercise undue influence with the executive. It would be unstable in its councils. An ambitious man would be unwilling to take any step that might endanger his popularity with the legislature. Impeachment is essential to deal with misconduct, and so the body selecting the executive would face the problem of impeaching its own choice. This mode was the worst.[12] The executive would be uninterested in maintaining the rights of his office, which would lead to legislative tyranny. If the executive is dependent on the legislature, the latter could perpetuate and support their usurpation by the influence of tax gatherers and other officers, by fleets, armies, etc. The executive would be interested in courting popularity in the legislature by sacrificing his executive rights. To that method cabal and corruption are attached.[13]

Nevertheless on June 2, the 8th day, the convention voted 8 to 2 in favor of this method, with the limitation that the executive hold office for one term of seven years.[14] On July 26, the 53rd day, the question was reconsidered and a favorable vote was again cast, but by a vote of 7 to 4.[15]

Eligibility for Reelection

This is one of the most interesting chapters of the proceedings. The question of succession was one of deep concern to the Founders. Having just wrested their independence from the Crown they were determined not to run the risk of another ruler. It was contended on the one hand that the executive ought to be so constituted as to be the great protector of the mass of the people; and unless he were eligible to reelection it would destroy the great in-

[10] Ib. p. 450, Mr. Madison.—July 17, p. 473, Mr. Wilson, Ib.
[11] Ib. p. 452, Mr. Butler.—Ib.
[12] Ib. p. 453, Mr. Gouv. Morris.—Ib.
[13] Ib. pp. 511-12, Mr. Gouv. Morris.—August 5a.
[14] Ib. p. 137.—The convention adjourned on the intervening day.
[15] Ib. p. 467, Mr. Wilson.

citement to merit public esteem by taking away the hope of being rewarded with a reappointment. It would tempt the executive to make the most of the short space of time allotted to him, to accumulate wealth and to provide for his friends. It would produce violations of the very constitution it is meant to secure.[16] The people at large would choose wisely;[17] and as a new legislature would have intervened before the executive's second term he would not depend for his second appointment on the same set of men as his first was received from.[18]

Rotation in office would not prevent intrigue and dependence on the legislature. The man in office would look forward to the period when he would become reeligible and he would be unwilling to take any step which might endanger his popularity with the legislature.[19]

On the other hand it was urged that, since there appeared no way to make the executive independent of the legislature but to give him his office for life or to make him eligible by the people,[20] he should not be left under a temptation to court a reappointment. If he should be reappointed by the legislature he would be no check on it. It had been said that a constitutional bar to reappointment would inspire constitutional endeavors to perpetuate himself. It may be answered that his endeavors could have no effect unless the people were corrupt to such a degree as to render all precautions hopeless; to which may be added that this argument supposes him to be more powerful and dangerous than other arguments admit, and consequently calls merely for stronger fetters on his authority. Mr. Randolph thought that ineligibility would be more acceptable to the people.[21] Mr. Ellsworth thought that the most eminent characters would be willing to accept the trust under this condition.[22] It was better for the executive to continue ten, fifteen or even twenty years and be ineligible afterwards,[23] thought Mr. Gerry. Any length of time agreed to would be preferable to the dependence which must result from eligibility to reelection, thought Mr. Wilson.[24] Mr. Charles Pinckney thought that no person should be eligible for more

[16] Id., p. 408, Mr. Gov. Morris—July 18.
[17] Id., p. 402, Mr. King—Id.
[18] Id., p. 427, Mr. Strong—July 24.
[19] Id., p. 428, Mr. Gov. Morris—July 25.
[20] Id., p. 411, Mr. Gov. Morris—July 18.
[21] Id., pp. 411-12—July 19.
[22] Id., p. 424—July 24.
[23] Id., p. 427—July 24.
[24] Id., p. 444—Id.

than six years in twelve years.[25] A second election ought to be absolutely prohibited. The primary object being the preservation of the rights of the people, it was an essential point, the very palladium of civil liberty, according to Mr. Mason, that the great officers of state, and particularly the executive, should at fixed periods return to that mass from which they were first taken, in order that they may feel and respect those rights and interests which are again to be personally valuable to them.[26] If the executive is made reeligible it would endanger the public liberties,[27] thought Mr. Charles Pinkney. The term should be limited to seven years,[28] said Mr. Rutledge.

On June 2 it was voted that the executive be ineligible after seven years—7 ayes and 2 noes.[29] On July 17 the clause "to be ineligible a second time" was stricken by a vote of 6 ayes, 4 noes.[30] On July 19 the question of eligibility arose again (after the convention had on the same day voted for a selection by electors) and the convention again voted against ineligibility for a second term—2 ayes and 8 noes.[31]

On July 26 the provision that the executive be appointed for seven years and be ineligible a second time was reinstated—7 ayes, 3 noes.[32]

On the question whether the term shall be seven years, the vote was 3 ayes, 5 noes.[33] On the question for six years the vote was 9 ayes, 1 no.[34] After the Report of the Committee of Eleven fixing the term at four years[35] a further attempt was made to change the term. It was moved that it be seven years instead of four, which was defeated—3 ayes, 8 noes.[36] It was again moved that the term be six years instead of four, and this was defeated—2 ayes, 9 noes.[37]

It was moved that if the president should be reeligible the choice in his second term should be made by electors

[25] Ib. p. 472—July 25.
[26] Ib. p. 457—July 26.
[27] Ib. p. 463—Sept. 4.
[28] Ib. p. 469—Sept. 5.
[29] Ib. p. 118.
[30] Ib. p. 396.
[31] Ib. p. 415.
[32] Ib. p. 457.
[33] Ib. p. 485—July 28.
[34] Ib. [illegible]
[35] Ib. pp. 529-30—Sept. 4.
[36] Ib. p. 536. Mr. Speight and Mr. W[illiamson]—Sept. 6.
[37] Ib. p. 538—Sept. 6.

appointed by the legislatures of the states for that purpose.[38] The motion was lost—4 ayes, 7 noes.[39]

The proposal that no person be eligible for more than six years in any twelve years was defeated.[40]

2. By the People

For the election by the people it was argued that the powers of both branches of the legislature should be derived from the people without the intervention either of state legislatures or executives, in order that all three departments should be as independent as possible of each other as well as of the states.[41]

The people would never fail to prefer some man of distinguished character or services, some man of continental reputation.[42] It was the best mode.[43] The people are the best and purest source.[44]

There were objections to this plan. It was impracticable.[45] The people were too little informed of personal characters in large districts and were liable to deception.[46] They would never be sufficiently informed of characters and would never give a majority of votes to any one man. They would generally vote for some man in their own state, and citizens from the larger state would have the best chance for election.[47] The right of suffrage was much more diffuse in the northern than in the southern states, and the latter could have no influence in the election on the score of their negroes.[48] There was a disposition in the people to prefer a citizen of their own state and this would result in a disadvantage to the smaller states.[49] The matter of the sizes of the different states was unanswerable; the citizens of the larger states would invariably prefer the candidate

38 Ib. p. 449, Mr. Ellsworth—July 25.
39 Ib. p. 452—July 25.
40 Ib. pp. 452, 455, Mr. C. Pinkney—July 25.
41 Ib. p. 135, Mr. Wilson—June 1.
42 Ib. p. 392, Mr. Govr. Morris—July 17.
43 Ib. p. 453, Mr. Govr. Morris—July 25.
44 Ib. p. 455, Mr. Dickenson—Ib.
45 Ib. p. 135, Mr. Mason—June 1.
46 Ib. p. 137, Mr. Gerry—June 2.
47 Ib. p. 392, Mr. Sherman—July 17.
48 Ib. p. 413, Mr. Madison—July 19.
49 Ib. p. 451, Mr. Madison—July 25.

within their own state.[50] To refer the election to the people would be so complex and unwieldy as to disgust the states.[51] The people of the smaller states would be placed under a disadvantage.[52] A popular election is radically vicious. The society of respectable men like the Order of the Cincinnati would be so influential as to delude the people into any appointment which the Order supported.[53] This Order, for the members of which great respect was felt, should never have a predominating influence in the government.[54]

On July 17 the convention voted against the election by the people—9 noes, 1 aye.[55] The matter came up again on August 24, the 70th day, and the vote was 9 noes to 3 ayes.[56]

3. By Electors

When the Virginia Plan for the selection of the executive by the legislature was under discussion on June 2, the 8th day, Mr. Wilson offered as a substitute the gist of the plan which was later adopted. He moved that the states be divided into districts, each district to name an elector who should ballot for the executive but could not elect one of their own number. In support of this method it was argued that it would produce more confidence among the people than an election by the legislature.[57] It would obviate the disparity of population between the northern and the southern states and seemed liable to fewest objections.[58] The best men of the state would not hold it derogatory from their character to be electors.[59] The electors chosen for this occasion would meet at once and proceed immediately to an appointment and there would be little opportunity for cabal or corruption.[60] The selection of electors by the people would introduce an element of chance, but it would diminish if not destroy cabal and depend-

[50] Ib. p. 452, Mr. Ellsworth—July 25.

[51] Ib. p. 452, Mr. Butler—Ib.

[52] Ib. p. 454, Mr. Williamson—Ib.

[53] Ib. p. 454, Mr. Gerry—Ib.

[54] Ib. p. 456, Mr. Mason—July 26—The membership of the Order in the United States today is approximately 1350—Roster Society of the Cincinnati 1938.

[55] Ib. p. 395, Mr. Govr. Morris.

[56] Ib. p. 610, Mr. Carroll.

[57] Ib. p. 136, Mr. Wilson—June 2.

[58] Ib. p. 413, Mr. Madison—July 19.

[59] Ib. p. 442, Mr. Gerry—July 24.

[60] Ib. p. 451, Mr. Madison—July 25.

ence.[61] It would avoid the danger of intrigue and faction which would affect an appointment made by the legislature; it would avoid the inconvenience incident to ineligibility for reelection, which should be forbidden if the selection were made by the legislature, and it would avoid the danger incident to impeachment of a president appointed by the legislature; and it would make the executive entirely independent of the legislature. No one had appeared to be satisfied with appointment by the legislature.[62]

Among the objections offered to an election by the people were the following: The electors chosen by the people would stand in the same relation to the people as the state legislatures, and yet their election would require similar trouble and expense.[63] It was extremely inconvenient and expensive to draw men together from all states for the single purpose of electing a Chief Magistrate.[64] Capable men would not undertake the service of electors from the more distant states.[65] The electors would be objects of the gratitude of the executive selected by them, just as much as if he had been selected by the national legislature. The introduction of a new set of men like the electors would make the government too complex.[66] The proposed electors would not be men of the first or even the second grade in the states.[67] Moreover an elector after voting for his favorite fellow citizen might throw his second vote away in order to insure the object of his first choice.[68]

Mr. Wilson's substitute was negatived the day it was offered—June 2—8 noes and 2 ayes.[69] On July 19 the convention reversed its former position and voted for the selection of the executive by electors—6 ayes, 3 noes.[70]

It was moved that the electors should not be members of the national legislature nor officers of the United States, nor be eligible to the supreme magistracy; and this motion was agreed to.[71]

61 Ib. p. 453, Mr. Govr. Morris—Ib.
62 Ib. pp. 662-3, Mr. Govr. Morris—Sept. 4.
63 Ib. p. 137, Mr. Williamson—June 2.
64 Ib. p. 441, Mr. Houston—July 23.
65 Ib. p. 442, Mr. Houston—July 24.
66 Ib. p. 442, Mr. Strong—July 24.
67 Ib. p. 442, Mr. Williamson—Ib.
68 Ib. p. 454, Mr. Madison—July 25.
69 Ib. p. 137.
70 Ib. p. 414, Mr. Ellsworth.
71 Ib. p. 422, Mr. Gerry and Mr. Govr. Morris—July 20.

On August 24 we find the convention again considering the selection of the executive, the draft presented providing that the executive power shall be vested in a single person elected by ballot of the legislature, to hold office for seven years and to be ineligible for a second term.[72] The matter was in this stage when it was referred on August 31 with other troublesome problems to the Committee of Eleven;[73] and the Committee of Eleven reported on September 4 that the executive be elected as follows: Each state to appoint in such manner as its legislature may direct a number of electors equal to the whole number of senators and members of the House of Representatives to which the state may be entitled in the Congress; the electors are to meet in their respective states and vote for two persons, of whom one at least shall not be an inhabitant of the same state as themselves; and the Congress may determine the final choosing and assembling of the electors, and the manner of certifying and transmitting their votes; the person "having the greatest number of votes shall be the President, if such number be a majority of that of the electors"; and if no candidate has a majority vote the senate shall immediately choose by ballot "one of them [the candidates] for President."[74]

Motion was made to insert in the report "but no person shall be appointed an elector who is a member of the legislature of the U. S., or who holds any office of profit or trust under the U. S." which passed *nem: con:*[75] and the report was amended accordingly.[76]

The final report of the Committee on Style and Arrangement contained substantially the same terms relating to electors as are in the Constitution today, the report containing the words "but no senator or representative shall be appointed an elector, nor any person holding an office of trust or profit under the United States";[77] while the verbiage of the Constitution is, "but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."[78]

Mr. King and Mr. Gerry—Sept. 6.

Art. 2, Sec. 1, Cl. 2.

Method of Selecting Electors—By the State Legislature or by the People

The method of selecting the electors came in for consideration—whether by state legislatures or by the people of the states.

One member preferred letting the legislatures nominate and electors appoint.[79] Another liked best an election by electors chosen by the legislatures of the states.[80]

A motion to select electors by the state legislatures was defeated on July 17 by a vote of 8 noes, 2 ayes.[81] On July 19 the convention reversed its position and adopted this method by a vote of 8 ayes and 2 noes.[82]

It was proposed that the electors should be chosen by the states in the ratio that would allow one elector to the smallest and three to the largest states.[83]

It was moved that electors be appointed in the following ratio: One for each state not exceeding 200,000 inhabitants, two for each above this number and not exceeding 300,000 and three for each state exceeding 300,000.[84] This motion was not acted on. Motion was made that electors be allotted to the states in the following ratio: One each for the states of New Hampshire, Rhode Island, Delaware and Georgia; two each to the States of Connecticut, New York, New Jersey, Maryland, North Carolina and South Carolina; three each to the States of Massachusetts, Pennsylvania and Virginia.[85] The motion was adopted—6 ayes, 4 noes.[86]

There was no vote on the motion that the number of electors be regulated by the number of representatives in the first branch.[87] It was moved that each elector vote for three candidates, two of which should be from some other state.[88] There was no vote on this motion.

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79 Formation of the Union, Op. cit. p. 137, Mr. Gerry—June 2.

80 Ib. p. 452, Mr. Butler—July 25.

81 Ib. p. 395, Mr. Martin.

82 Ib. p. 414, Mr. Ellsworth.

83 Ib. p. 412, Mr. Paterson—July 19.

84 Ib. p. 414, Mr. Ellsworth—Ib.

85 Ib. p. 416, Mr. Gerry—July 20.

86 Ib. p. 417, Mr. Gerry—Ib.

87 Ib. p. 417, Mr. Williamson—Ib.

88 Ib. p. 454, Mr. Williamson—July 25.

If Electors Fail to Elect, Selection to be Made

4. By Senate,

5. By House and Senate, or

6. By House.

The possibility that the electors would not complete their task was not overlooked. In the event of failure on the part of the electors to cast a majority for a candidate for president, it was proposed that the duty be performed by (1) the senate, (2) the house and senate, or by (3) the house. The senate was preferred because fewer could then say to the president: "You owe your appointment to us." Moreover, the president would not depend so much on the senate for his reappointment as on his general good conduct.[89] On the other hand if the election should be thrown into the senate the result would be that the same body of men would face the duty of impeaching the president in the event that duty arose.[90] The whole power of electing would be thrown into the senate.[91] Considering the powers of the president and those of the senate, if a coalition should be established between these two branches, they would be able to subvert the Constitution.[92] As the appointment was at the moment regulated (election by the senate) one member could not forbear expressing his opinion of its utter inadmissibility. He would prefer the government of Prussia to one which would put all power into the hands of seven or eight men, and fix an aristocracy worse than an absolute monarchy.[93] If election by electors was to be adopted, it would be preferable that they meet all together and decide finally without any reference to the senate.[94] It was thought preferable that the election be made in the house rather than in the senate, as the house would be often changed.[95]

It was noted that the power to nominate to offices would give great weight to the president, and that this would tend to perpetuate the president, so that the better remedy is

[89] Ib. p. 665, Mr. Govr. Morris—Sept. 4.
[90] Ib. p. 663, Mr. C. Pinkney—Sept. 4.
[91] Ib. p. 668, Mr. Rutledge—Sept. 5.
[92] Ib. p. 669, Mr. Mason—Sept. 5.
[93] Ib. p. 672, Mr. Mason—Sept. 5.
[94] Ib. p. 677, Mr. Spaight—Sept. 6.
[95] Ib. p. 664, Mr. Wilson—Sept. 4.

the election of the president by the highest number of votes cast by the electors, whether a majority or not.[96]

It was then suggested that the eventual choice be made by the legislature voting by states and not per capita.[97] Then Mr. Sherman thought the house preferable to the whole legislature.[98] It would avoid the aristocratic influence of the senate.[99]

It was moved to strike out the word "if such number be a majority of that of the electors," thus making possible the choice of the executive by a minority of the votes of the electors.[100] The motion was negatived—2 ayes, 9 nos.[101] It was then moved to strike out the word "senate" and insert the word "legislature," which was negatived—3 ayes, 7 noes.[102]

It was moved that the electors meet at the seat of the general government, but all states voted no except North Carolina.[103] It was then moved that the election be on the same day throughout the United States, which was adopted —ayes 8, noes 3.[104] It was then moved that the eventual appointment be referred to the senate; and this was adopted by 7 ayes to 1 no.[105] And it was then moved that at least two-thirds of the senate be present at the choice of a president,[106] and this also was adopted—6 ayes, 4 noes.[107]

The provision that the senate should immediately choose in the event of the failure of any candidate to secure a majority was stricken and the "house" inserted in lieu thereof—10 ayes, 1 no.[108] And it was added that in case two candidates should receive an equal number of votes from the electors, the selection should be referred to the house—7 ayes and 3 noes.[109]

It was then moved that a quorum of the house for this

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96 Ib. pp. 675-6, Mr. Hamilton—Sept. 6.
97 Ib. p. 678, Mr. Williamson—Sept. 6.
98 Ib. p. 678—Sept. 6.
99 Ib. p. 678, Mr. Mason—Sept. 6.
100 Ib. p. 669, Mr. Mason—Sept. 5.
101 Ib. p. 670, Mr. Mason—Sept. 5.
102 Ib. p. 670, Mr. Wilson—Sept. 5.
103 Ib. p. 677, Mr. Spaight—Sept. 6.
104 Ib. p. 677—Sept. 6.
105 Ib. p. 677—Sept. 6.
106 Ib. p. 677—Sept. 6.
107 Ib. p. 678—Sept. 6.
108 Ib. p. 678, Mr. Sherman—Sept. 6.
109 Ib. p. 678, Mr. Madison—Sept. 6.

purpose should consist of a member or members from two-thirds of the states, which was agreed to,[110] the motion that the quorum should consist also of a majority of the whole number of the house of representatives being voted down—6 noes, 5 ayes.[111]

7. By the Second Branch of the Legislature

The suggestion that the second branch of the legislature, or the senate,[112] choose the executive, appears to have received no further discussion.[113]

8. By State Executives

The plan which the Founders had in mind generally was that the first branch (the house) [114] would be chosen by the people and the second branch (the senate) would be selected by the state legislatures. It was now proposed that the third branch (or executive) be named by state executives.[115] It was urged that the latter would be most likely to select the fittest man, and it would be to their interest to support the administration of the man of their choice.[116] The objections to this plan were the following: That the small states would lose all chance of an appointment from within themselves; that the executives of the states would be little conversant with characters not within their own small spheres; that they would generally be guided by the views of the state legislatures and would profer either favorites within the states, or such as might be expected to be most partial to the interests of their respective states; that a national executive so named would not likely defend with becoming vigilance and firmness the national rights against state encroachments; and that the executives would not cherish the great Oak which would reduce them to paltry shrubs.[117]

One objection was insuperable,—that state executives, being standing bodies, could and would be courted and in-

[110] Ib. pp. 678-9, Mr. King—Sept. 6.
[111] Ib. p. 678, Mr. King—Sept. 6.
[112] Ib. p. 116, Mr. Randolph—May 29.
[113] Ib. p. 136, Mr. Rutledge—June 1.
[114] Ib. p. 116.
[115] Ib. p. 174, Mr. Gerry—June 7.
[116] Ib. p. 179, Mr. Gerry—June 9.
[117] Ib. pp. 179-80, Mr. Randolph—June 9.

trigued with by the candidates, by their partisans, and by the ministers of foreign powers.[118]

This proposal was defeated, 9 noes, 0 ayes.[119]

9. By State Executive With Advice of State Councils

A motion that the executive be appointed by the governors of the states, with advice of their councils, and where there were no councils, by electors chosen by the legislatures,[120] seems to have had no discussion or to have been voted upon.

10. By State Legislatures

It was moved by Mr. Gerry that the legislatures of the several states vote by ballots for the executive in the same proportions as had been proposed that they should choose electors, and in case a majority of the votes should not be given to one person, the first branch of the national legislature (the house) should choose two out of the four candidates having the most votes, and from these two, the second branch should choose the executive.[121]

This method was objectionable from many points of view. One was that the legislatures of the states had betrayed a strong propensity for a variety of pernicious measures; and one purpose of having a national legislature was to control this propensity, just as one purpose of having a national executive, insofar as he would have a power to negative laws, was to control any propensity of the national legislature in a similar direction. If the legislatures choose the executive this controlling purpose might be defeated. The legislatures can and will act with some kind of regular plan, and will promote the appointment of a man who will not oppose their favorite objectives. Should a majority of the legislatures at the time of election have the same objective or different objectives of the same kind, the national executive would be rendered subservient to them.[122] The motion was lost.[123]

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118 Ib. p. 451—July 25.

119 Ib. p. 180, Mr. Gerry—June 9.

120 Ib. p. 449, Mr. Gerry—July 25.

121 Ib. p. 443—July 24.

122 Ib. p. 450, Mr. Madison—July 25.

123 Ib. p. 443, Mr. Gerry—July 24.

11. By the States, Each of Which Would Vote for a Different Executive and from the Number Thus Selected either the National Legislature or Electors Appointed by the National Legislature Would Select the Executive

It was suggested that each state select an illustrious name, and out of these thirteen an executive magistrate might be chosen either by the national legislature or by electors appointed by it.[124] But there seems to have been no further discussion of this suggestion.

So much for the discussions in the Constitutional Convention, and their final decision on the method of selecting the chief executive. Now let us see how their solution of the problem was received in the state conventions.

The fear of the power of the executive crept into the debates in the state conventions. Some of the great in history expressed their views.

In Virginia, Patrick Henry thundered:

> . . . Shew me that age and country where the rights and liberties of the people were placed on the sole chance of their rulers being good men, without a consequent loss of liberty? . . .
>
> If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute? . . .[125]
>
> * * *
>
> . . . He [Mr. Randolph] [126] told us, we had an American dictator in the year 1781. . . . We gave a dictatorial power to hands that used it gloriously; and which were tendered more glorious by surrendering it up. Where is there a breed of such dictators? Shall we find a set of American Presidents of such a breed? Will the American President come and lay prostrate at the feet of congress his laurels? I fear there are few men who can be trusted on that head. . . .[127]
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> . . . When the commons of England, in the manly language which became freemen, said to their king,

[124] Ib. p. 455, Mr. Dickinson—July 25.

[125] Elliot's Debates in the State Conventions on the Adoption of the Federal Constitution, 1788, Vol. 3, p. 85.

[126] Ib. p. 102.

[127] Ib. pp. 170-1.

you are our servant, then the temple of liberty was complete. . . . What powerful check is there here to prevent the most extravagant and profligate squandering of the public money? What security have we in money matters? . . .[128]

* * *

. . . The delegation of power to an adequate number of representatives, and an unimpeded reversion of it back to the people, at short periods, form the principal traits of a republican government. . . .[129]

* * *

I conjure you once more to remember the admonition of that sage man who told you that when you give power, you know not what you give. . . .[130]

And George Mason, the great protector of states' rights:

. . . as it now stands, he [the President] may continue in office for life; or in other words, it will be an elective monarchy.[131]

And James Monroe:

. . . Will not the influence of the president himself have great weight in his re-election? The variety of the offices at his disposal, will acquire him the favor and attachment of those who aspire, after them, and of the officers, and their friends. He will have some connexion with the members of the different branches of government. . . . I presume that when once he is elected, he may be elected forever. . . . Powerful men in different states will form a friendship with him. For these reasons, I conceive, the same president may always be continued, and be in fact elected by congress, instead of independent and intelligent electors. . . .[132]

So in Pennsylvania, James Wilson, in an extended report before the convention of that state, said:

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128 Ib. p. 175.
129 Ib. p. 369.
130 Ib. p. 404.
131 Ib. p. 445.
132 Ib. p. 221.

> . . . The convention, sir, were perplexed with no part of this plan, so much as with the mode of choosing the President of the United States. . . .[133]
>
> * * *
>
> . . . Under this regulation, [selection of the President by electors], it will not be easy to corrupt the electors, and there will be little time or opportunity for tumult or intrigue. This, sir, will not be like the elections of a Polish diet, begun in noise and ending in bloodshed.[134]

But in Connecticut, Governor Huntingdon said in that convention:

> . . . The history of man clearly shews, that it is dangerous to entrust the supreme power in the hands of one man. . . .[135]
>
> * * *
>
> This [the new government] is a new event in the history of mankind. Heretofore most governments have been formed by tyrants, and imposed on mankind by force. Never before did a people in time of peace and tranquility, meet together by their representatives, and with calm deliberation frame for themselves a system of government. . . .[136]

James Iredell, who with James Wilson was appointed by Washington on the first Supreme Court, said in the North Carolina Convention:

> . . . The best writers, and all the most enlightened part of mankind, agree that it is essential to the preservation of liberty, that such distinction and separation of [governmental] powers should be made. But this distinction would have very little efficacy, if each power had no means to defend itself against the encroachment of the others.[137]

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[133] Ib. p. 473.
[134] Ib. p. 474.
[135] Ib. p. 200.
[136] Ib. p. 201.
[137] Ib. Vol. 4, p. 95.

But James Lincoln in the South Carolina Convention was very critical:

> . . . The president holds his employment for four years, but he may hold it for fourteen times four years—in short, he may hold it so long that it will be impossible, without another revolution, to displace him. . . .[138]

Three conventions—Virginia, New York and North Carolina—recommended amendments to the Constitution:

Virginia:

> Thirteenth. That no person shall be capable of being President of the United States for more than eight years in any term of sixteen years.[139]

New York:

> That no Person shall be eligible to the Office of President of the United States a third time.[140]

North Carolina:

> XIV. That no person shall be capable of being president of the United States for more than eight years in any terms of sixteen years.[141]

Is Our Sun Setting?

From all the foregoing it is not difficult to see that the aim of the Founders was to make the three departments of the government independent of each other and to avoid the threat of monarchy. They desired to eliminate intrigue, the influence of foreign ministers, the perpetuation of the executive by Congress through the influence of tax-gatherers, fleets and armies. If Congress select the executive, ran the argument, he must not be eligible for succession. If electors select him their independence should be a sufficient assurance against usurpation or tyranny. To prevent any untoward influence being exercised upon them by any other branch of the government, the electors were

138 Ib. p. 300.

139 Formation of the Union, Op. cit. p. 1032.

140 Ib. p. 1042.

141 Ib. p. 1049.

safeguarded, and they were forbidden to be members of the House or Senate or to hold any positions of trust or profit under the United States. Only in the event of a failure of the electors to cast a majority was the election thrown into any branch of Congress, and the House, because it would be often changed, was finally decided on as the proper body to elect in this emergency.

The Founders wished to avoid a coaltion between the Senate and any candidate since the power of selection would be in the hands of so few men. The electors were required to meet on the same day throughout the United States, which with the post and messengers as the only media of information, would prevent cabal and corruption. The votes would be by states, and a majority of states was necessary to a choice.

A choice by state executives was discarded because of the possible influence they would exercise in selecting a president, and lest they should cooperate with him in reducing the powers of the federal government,—"the great Oak which is to reduce them to paltry shrubs." Indeed, there would be a smaller number of executives to be intrigued with than senators if the senators were selected.

It was not wise to place the power in state legislatures, for they had already shown a strong propensity to a variety of pernicious measures; and it was feared that if the legislatures chose the president, he would be subservient to them and would not exercise his control over Congress if the Congress undertook the passage of like measures.

For a century and a half the solution of the Founders has produced no disastrous results. The government which they set up has been that of a free people. It remains now to be seen whether the rising sun painted behind Washington's chair, which Dr. Franklin said was difficult to distinguish from the setting sun, has indeed become a setting sun.[142] And a test will be put to the Doctor's prophetic sense when he was asked by Mrs. Powell in Philadelphia, "if we had a monarchy or a republic." He replied: "A republic, if you can keep it."[143]

[142] Formation of the Union, Op. Cit. p. 745.

[143] Ib. p. 952.

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APPENDIX "D"

Alabama Law (Regular Session, 1951)

Act No. 557 H. 284—Givhan

AN ACT

To further amend Section 226 of Title 17 of the Code of Alabama of 1940.

Be It Enacted by the Legislature of Alabama:

Section 1. That Section 226 of Title 17 of the Code of Alabama of 1940 be, and the same hereby is, further amended to read as follows:

"Section 226. Electoral meeting and supply of vacancies,—The electors of president and vice-president are to assemble at the office of the secretary of state, at the seat of government at twelve o'clock noon on the second Tuesday in December next after their election, or at that hour on such other day as may be fixed by congress, to elect such president and vice-president, and those of them present at that hour must at once proceed by ballot and plurality of votes to supply the places of those who fail to attend on that day and hour."

Section 2. That all laws or parts of laws, general, local or special, in conflict with the provisions of this act are hereby repealed.

Section 3. This act shall take effect immediately upon its passage and approval by the Governor, or its otherwise becoming a law.

Approved August 28, 1951.
Time: 5:31 P. M.

I hereby certify that the foregoing copy of an Act of the Legislature of Alabama has been compared with the enrolled Act and it is a true and correct copy thereof.

Given under my hand this 30 day of August, 1951.

R. T. Goodwyn, Jr.,
Clerk of the House.